Supreme Court, U.S.
FILED

93 1672 APR 19 1994

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No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1993

DEBRA SUE PAHDOPONY,
Petitioner, Appellant,

vs.

THE UNITED STATES DEPARTMENT
OF THE INTERIOR,
Respondent, Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals below should have established a uniform federal standard relating to the treatment of adopted Indians in Indian wills consistent with the provisions of THE INDIAN CHILD WELFARE ACT OF 1978, 25 U.S.C. section 1901, *et seq.*, the Department of Interior's own probate regulations and federal decisions and found that the adopted granddaughter of a Comanche Indian testator was entitled to take a remainder interest under his will.

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OPINIONS BELOW

The Supplemental Order Determining Remainder Interest After Life Estate of the Department of the Interior administrative law judge is unreported and appears in the appendix to this Petition for a Writ of Certiorari at App. I. The opinion of the district court is unreported and appears in the appendix to this Petition for a Writ of Certiorari at App. VI. The opinion and judgment of the Court of Appeals is unreported and appears at App. X.

JURISDICTION

The judgment of the Court of Appeals was issued on January 20, 1994. This Court has jurisdiction pursuant to 28 U.S.C. section 1254(1).

STATUTES AND REGULATIONS

THE INDIAN CHILD WELFARE ACT OF 1978, 25 U.S.C. section 1902, provides in pertinent part as follows:

> **§ 1902. Congressional declaration of policy**
>
> The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

Department of Interior Regulations regarding the probate of Indian wills, 43 CFR section 4.200 *et seq.* provide in pertinent part:

§ 4.201 **Definitions** as used in this sup-part:

> ... (k) the word "child" or "children" include adopted child or children...

§ 4.261 **Anti-Lapse provisions**:

When Indian testator devises or bequeaths trust property to any of his grandparents or to the lineal descendant of any grandparent or the devisee or legatee dies before the testator leaving lineal descendants, such descendants shall take the right, title or interest so given by the will per stirpes. Relationship by adoption shall be equivalent to relationship by blood.

STATEMENT OF THE CASE

This is an action brought pursuant to THE ADMINISTRATIVE PROCEDURES ACT, 5 U.S.C. section 701 *et seq.*, to review a decision and order of the Department of the Interior (the "Department") in Indian probate proceedings.

An administrative law judge for the Department construed the Last Will and Testament of Frank (Tate) Nevaquaya Tooahimpah (the "Decedent") to determine the identity of the "heirs of [the] body" of the life tenant in a portion of the Decedent's original Comanche Allotment No. 146. In a Supplemental Order Determining Remainder Interest After Life Estate, the administrative law judge for the Department found that Petitioner Debra Sue Pahdopony was the sole heir at law of the life tenant Lois Pahdopony but denied her status as an "heir of the body" of Lois Pahdopony solely because she was Lois Pahdopony's adopted, rather than biological child, thus denying her the right to take under her grandfather's will.

Decendent died testate on July 15, 1966. At the time of his death, he was 86 years old and owned a substantial interest in restricted Indian land consisting of 155 acres of his own original Comanche Allotment No. 146 and a fractional interest in six (6) other Comanche Allotments. All of the property is located in Oklahoma and is under the jurisdiction of the Anadarko Agency of the Bureau of Indian Affairs. The Decedent spoke little or no

English. As far as can be ascertained, he was also illiterate, unable even to sign his name (he executed his will by affixing his thumb print). At the hearing in the original probate proceeding, one of the attesting witnesses, who was also a Comanche-English interpreter and a BIA attorney, testified that the Decedent made and executed his will properly, that the Decedent was of sound and disposing mind and memory, and that he was not acting under undue influence, fraud, duress or coercion when he made his will, and that he understood the provisions of his will. The Decedent made specific devises to each of his seven children and four of his grandchildren. The devise to his daughter Lois Pahdopony of a life estate in a portion of his Comanche Allotment property is the portion of the Decedent's will at issue in this case. Decedent devised to his daughter a life estate in his allotment "with remainder to the heirs of her body." Lois Pahdopony died on April 26, 1988, survived by her adopted daughter and biological grand-niece, Debra Sue Pahdopony, Petitioner in this action. Debra Sue Pahdopony is thus both the adopted granddaughter of Decedent and also his biological great-granddaughter.

On March 8, 1990, the Decedent's estate was re-opened to determine the heirs of [the] body" of Lois Pahdopony. No testimony was taken and no evidence was presented on the issue of what Decedent intended when he used the words "heirs of her body" in his will. The administrative law judge, applying Oklahoma law, excluded Debra Sue Pahdopony as a taker under her grandfather's will because she was adopted, finding that the technical meaning of the words used in the Decedent's will exclude adopted childern and holding: "It is axiomatic that technical terms and phrases in a will must be given their technical meaning absent a clear showing that the testator intended a different meaning."

Debra Sue Pahdopony appealed the administrative law judge's decision to the Interior Board of Indian Appeals in Probate Matters, Office of Hearings and Appeals (the "Board").

The Board affirmed the administrative law judge's determination that the phrase "heirs of her body," as used in Decedent's will, does not include Debra Sue Pahdopony because she is the adopted and not the biological daughter of Lois Pahdopony, again applying Oklahoma law. See, *Estate of Frank (Tate) Nevaquaya Tooahimpah*, 91 IBIA 15 (Decided March 4, 1992).

Debra Sue Pahdopony sought judicial review of the decisions of the administrative law judge and the Board by filing a Petition for Judicial Review with the United States District Court for the Western District of Oklahoma. The District Court in an order dated December 16, 1992, affirmed the decision of the administrative law judge and the Board.

The decision of the district court was appealed to the Tenth Circuit Court of Appeals on Januay 14, 1993. On January 20, 1994, the court of appeals issued its Opinion and Judgment in the appeal, affirming the district court without considering any of the legal and policy arguments raised by Debra Sue Pahdopony.

REASONS FOR GRANTING THE WRIT

FEDERAL LAW AND NOT STATE LAW CONTROLS THE INTERPRETATION OF INDIAN WILLS

Congress has clearly mandated that Indians in the United States be treated uniformly, pursuant to a single body of federal law. A 1910 amendment to THE INDIAN GENERAL ALLOTMENT ACT, 25 U.S.C. section 373, permits owners of allotments or other restricted Indian lands to devise their allotments by will, but only "in accordance with the regulations to be prescribed by the Secretary of the Interior." An Indian will devising allotments or restricted property is not considered valid or in effect until the Secretary of the Interior approves it. 25 U.S.C. section 373. The probate of Indian wills devising allotments or other restricted property is exclusively in the jurisdiction of the

Department. "Such wills need to be probated in a state court, but are to be approved or disapproved by the Secretary of the Interior and filed for record in the Department of the Interior." *Hanson v. Hoffman*, 113 F.2d 780, 789 (10th Cir. 1940). Once the Department has approved an Indian will under its jurisdiction, state law has no application. *Hanson v. Hoffman*, 113 F.2d at 780; *Spriggs v. United States*, 297 F.2d 460 (10th Cir. 1961), cert. denied, 8 L.Ed.2d 279 (1962). Federal law preempts state law and the construction of an Indian will under the jurisdiction of the Department is a question, not of state, but of federal law. *Estate of William Mason Cultee*, 9 IBIA 43 (1981), aff'd sub nom., *Cultee v. United States*, No. 81-1164C (W.D. Wash. Sept. 14, 1982), aff'd. 713 F.2d 1455 (9th Cir. 1983); *Blanser v. Cardin*, 256 U.S. 319, 65 L.Ed. 950 (1921). Accordingly, federal case law, including decisions of the Interior Board of Indian Appeals, are controlling. *Estate of Minona June Little Hawk Garcia*, 14 IBIA 106 (April 4, 1986); *Estate of Roger Wilkin Rose*, 13 IBIA 331 (December 4, 1985).

Congress has placed the disposition of restricted Indian lands by will under the exclusive jurisdiction of the Department to be governed by federal law. The application of state law to issues of Indian will construction, if permitted to stand, that will result in a patchwork of conflicting holdings which will frustrate Congressional intent. The practical and legal effect of the Department's initial decision and the subsequent affirmations thereof by the Board, the district court and the court of appeals is to leave Indians in Oklahoma subject to a set of legal principles not applicable to Indians in the rest of the United States.

EXISTING FEDERAL RULES OF LEGAL CONSTRUCTION REQUIRE A FUNDING THAT DEBRA SUE PAHDOPONY SHOULD BE INCLUDED ABSENT DECEDENT'S EXPRESS INTENT TO EXCLUDE HER.

Certain rules of legal construction were applicable when the Department re-opened the Decedent's estate to determine the heirs of Lois Pahdopony's body. In construing and interpreting an Indian will, an administrative law judge is required to follow the testator's intentions as lons as those intentions are ascertainable and not contrary to law or public policy. *Estate of Paul Wilford Hail*, 13 IBIA 140 (Mar. 28, 1985); *Estate of Dorothy Sheldon*, 7 IBIA 11, 85 I.D. 31 (Feb. 7, 1978). A court is required to gather the intent, when possible, from the words of the will construed in their natural and obvious sense, must consider all surrounding circumstances at the time of execution, the objects sought to be obtained, and must endeavor to determine what was in the testator's mind when he made the bequest and must not make a new will or warp the testator's language in order to obtain a result which she or he might consider "right" or "just." *Estate of Dorothy Sheldon*, 7 IBIA 11, 85 I.D.31

In construing a will the testator's intent is ascertained either through factual interpretation or legal construction. Practical interpretation is the process whereby a testator's "subjective meaning or actual intention" is ascertained "from the words of the will as viewed in the light of extrinsic evidence concerning his background." PAGE ON THE LAW OF WILLS § 30.3, 10 (1961). When a lack of evidence makes factual interpretation impossible, the court or, in this case, administrative law judge must imply a testator's intent through the application of legal principles. *Id.* In these situations it is impossible to determine the actual intent of the testator. When a testator's intent is not clear from the language employed in the will or from the surrounding circumstances, a court must turn to rules of construction and attempt to construct and supply intent, by implication, which comports with public policy. *Johns v. Cobb*, 402 F.2d 636 (D.C. Cir. 1968); *Purifoy v. Mercantile-Safe Deposit and Trust Co.*, 398 F. Supp. 1075 (D. Md. 1974), aff'd, 567 F.2d 268 (4th Cir. 1977). The task is no longer a search

for the *actual* intent of the testator (which is unknown and unknowable); rather it is an endeavor to assign meaning to the language of the will that comports with sound public policy. See, 4 PAGE, *supra*, § 30.3.

Whether Decedent intended, by use of the phrase "heirs of her body," to include or exclude adopted children is not plainly apparent from the language of his will or the surrounding circumstances. It is, in fact, impossible to determine from the record or the face of the Decedent's will whether the Decedent intended to include or exclude adopted children. Because no direct evidence exists indicating what the Decedent actually intended by the words "heirs of her body," the administrative law judge was unable to determine Decedent's subjective or actual intent and he should have turned to principles of legal construction to imply the Decedent's intent when he used the the words "heirs of her body."

It is clear that in construing the Decedent's will to ascertain his intent federal law is to be applied. The administrative law judge, however, applied Oklahoma law, and ignored the Department's regulations and applicable federal case law directly on point.

A FEDERAL SUBSTANTIVE RULE OF CONSTRUCTION OF THE TERM "HEIRS OF THE BODY" IN INDIAN WILLS SHOULD MANDATE THAT THE TERM INCLUDE ADOPTED INDIAN CHILDREN UNLESS CLEARLY EXCLUDED BY A TESTATOR

In construing an Indian will the Department was bound "to assign a meaning to the language of the will that comports with sound public policy." *Purifoy v. Mercantile-Safe Deposit and Trust Company*, 398 F. Supp. 1075 (D. Md. 1974). In the case of the construction of an Indian will under the jurisdiction of the Department, existing federal case law, the Department's regulations and public policy requires that adopted Indian

children be treated equally with biological Indian children. Federal policy regarding the treatment and status of adopted Indian children reflect a federal standard that should have applied to find that the words "heirs of the body" in an Indian will includes adopted children absent a clear expression of intent to exclude them. Instead, the administrative law judge, the Board and the district court found that the words exclude adopted children unless absent a expression of intent to include them. The court of appeals railed to decide one way or the other and made a strained factual finding that the Decedent intended to exclude adopted persons.

No decision of the Board has addressed the specific words "heirs of her body" in the context of adoption, nor has any federal court directly addressed the meaning of the exact term "heirs of the body." The D.C. Circuit has construed the interchangeable term "issue" in a factually similar context. In *Johns v. Cobb*, 402 F. 2d 636, 638 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1087, 21 L.Ed.2d 781 (1969), the D.C. Circuit held that, under federal law, absent any contrary indication of the testator's intent, the term "issue" in a will should include adopted children. The court stated that its holding was "[i]n keeping with this policy [expressed in D.C. Code § 16-312(a) to equate natural and adopted persons], and . . .the unmistakable trend of judicial decisions in other jurisdictions." *Id.* The effect that the technical meaning of the word "issue" should have on the construction of the will is consistent in *Johns v. Cobb*:

> Appellees argue, however, that the controversy can be resolved merely by looking at the word "issue", which in their view has an established legal meaning that excludes adopted children. We disagree. Our cases have seldom discussed the term in relation to adoption, and enough uncertainty surrounds its usage that we doubt a competent draftsman who wanted to exclude adopted children would rely on the word "issue" alone

> to express that purpose. "Terms such as 'issue' * * * may or may not include adopted children; read alone, and apart from context, those words are ambiguous." (citation omitted)

402 F.2d at 637-638. See also, *Riggs Nat'l Bank of Washington D.C. v. Summerlin*, 445 F.2d 201 (D.C. Cir.), cert. denied, 30 L.Ed.2d 91 (1971). Like the word "issue" the words "heirs of the body" are ambiguous, particularly in an Indian will, used by an Indian testator that spoke little or no English. The words are thus not easily susceptible of definition by turning to the historic common law definition, without considering modern public policy.

There is perhaps no clearer expression of federal policy regarding adopted Indian children than that contained in THE INDIAN CHILD WELFARE ACT OF 1978, 25 U.S.C. section 1902. Congress intended to "promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture..." 25 U.S.C. section 1902. Congress thus sought to encourage foster and adoptive placement of Indian children with : (1) a member of the child's extended family; (2) other members of the child's Indian tribe; or (3) other Indian families. It would be contrary to this federal policy, which encourages the adoption of Indian children by the children's extended families or other Indian families, to impose a burden on Indian testators living in Oklahoma by differentiating between adopted and biological children when making wills. Once an Indian child has been adopted into an Indian home, that child is not different, and should not be treated differently, in any respect, from biological children.

Federal regulations regarding Indian probate matters also reflect the sound policy against distinguishing between adopted

and biological children. The federal statute governing the disposal of restricted Indian property by will, requires that such wills accord "with the regulations to be prescribed by the Secretary of the Interior. . ." 25 U.S.C. section 373. Although the Department has not adopted comprehensive regulations concerning the probate of Indian wills, two sections in the regulations relating to Indian probates and probate appeals, 43 CFR section 4.200 *et seq.*, are pertinent to this issue: § 4.201 because the words "child" or "children" include adopted child or children, and § 4.261, the anti-lapse provision of the regulations, because it provides clearly that *relationship by adoption shall be equivalent to relationship by blood.*

Federal law relating to descent and distribution of trust or allotment property is also applicable, showing that it is the intent of Congress that adopted children be heirs notwithstanding the effect of state law. 25 U.S.C. section 372a establishes that, for descent and distribution purposes, a legally adopted person shall be considered as an heir of the deceased Indian, notwithstanding what state law might provide.

Public policy and federal law requires that there be no distinction between natural and adopted children. In the face of the overwhelming legal and policy expression of equivalence in the United States, to have turned to an outmoded, outdated Oklahoma case to support a decision was not in accordance with law.

THE DEPARTMENT'S ACTION MUST BE SET ASIDE BECAUSE IT WAS ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, OR OTHERWISE NOT IN ACCORDANCE WITH LAW.

The district court and court of appeals compounded the error made by the Department by refusing to address the issue that must be addressed in order to have uniformity of interpretation of Indian wills and in doing so failed the statutory imperative

imposed on the federal courts by THE ADMINISTRATIVE PROCEDURES ACT, 5 U.S.C. section 701, *et seq.*, which provides that a reviewing Court shall "... hold unlawful and set aside agency action, findings, and conclusions" found not to meet certain standards. In all cases, agency action must be set aside if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. section 706(2)(A). The applicable standards of section 706 of THE ADMINISTRATIVE PROCEDURES ACT require that a reviewing court engage in a substantial inquiry, to engage in a "thorough, probing, in-depth review." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). The reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* @ 416. The Act requires a reviewing court, to the extent necessary to decision, "to decide all relevant questions of law." 5 U.S.C. section 706. It is in the execution of this duty that both the district court and court of appeals failed.

Neither the district court nor the court of appeals engaged in the substantial inquiry required of them nor did they decide all relevant questions of law.

The sole question for decision in this case is what the Decedent intended when he used the words "heirs of her body" in his will. Existing federal law, embodied in the Department's regulations, federal statutes and case law, provided the framework for a definitive finding that includes adopted children in the class "heirs of her body" unless there is evidence that the testator clearly intended to exclude them. By failing to apply the Department's regulations and federal statutes and case law, and instead turning to Oklahoma law a fundamental error of law was committed that leaves Oklahoma Indians subject to one legal standard and all other Indians subject to another. It makes no sense to encourage the adoption of Indian children into Indian homes but to then discriminate against adopted Indians

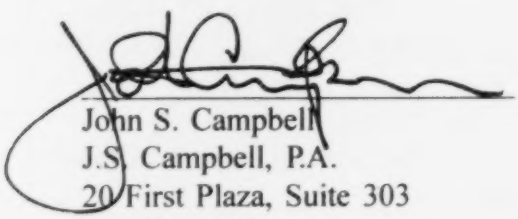
in the probate of Indian wills.

Federal law and policy, the Department's own regulations and existing federal case law provide the only basis upon which the Decedent's intent could have and should have been determined. By inferring the Decedent's intent to exclude adopted children from the technical words "heirs of her body", without considering federal law or policy, the decisions below are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," within the meaning of 5 U.S.C. section 706(2)(A).

CONCLUSION

For these reasons, Debra Sue Pahdopony respectfully requests that this Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,



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I

APPENDIX

(Entered September 25, 1990)
UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS

INDIAN PROBATE No.
IP OK 1 P 85-1
IBIA 85-22
H-33-71
H-34-67

IN THE MATTER OF THE ESTATE OF
FRANK (TATE) NEVAQUAYA TOOAHIMPAH
DECEASED COMANCHE ALLOTTEE 146

SUPPLEMENTAL ORDER DETERMINING REMAINDER INTEREST AFTER LIFE ESTATE

The above-named decedent died testate July 15, 1966. His Last Will and Testament dated May 21, 1965, was approved by Order Approving Will and Decree Distribution dated February 20, 1967.

By the terms of said Will and Order, the decedent's daughter, Lois Tooahimpah Pahdopony, received a life estate in a portion of decedent's own allotment, with the "remainder to the heirs of her body."[1] Lois Tooahimpah Pahdopony died

---

[1] The decedent made similar devises to each of his seven children. He also made specific devises to three of his grandchildren but did not limit them to life estates. The residue of his estate he devised to "the devisees

April 26, 1988, and her heirs were determined to be her subsequently deceased husband, Stacy Pahdopony and adopted daughter, Debra Sue Pahdopony nee Debra Sue Otipoby. Estate of Lois Tooahimpah Pahdopony, (IP OK 322 P 88; February 1, 1990).[2]

Debra Sue Pahdopony nee Debra Sue Otipoby claims that as the adopted daughter of Lois Tooahimpah Pahdopony, she is an heir of her (Lois Tooahimpah Pahdopony) body. In support thereof she has submitted a brief asserting that the modern rule is that adopted children are included in the term "heirs of her body." This is premised on the fact that the adoption statutes of a great many states including Oklahoma (10 O.S. 60.16) specifically provide that an adopted child shall be entitled to inherit from and through the adoptive parents in accordance with the laws of intestate succession.

To accept the assertions of the claimant is to equate the phrase "heirs of the body" to the simple term "issue" or perhaps even "children." The words "of the body" in effect become surplusage.

The phrase "heirs of the body is a legal and technical phrase dating back prior to the founding of the United States. It has come to us from the common law of England. It is axiomatic that technical terms and phrases in a will must be given their technical meaning absent a clear showing that the testator intended a different meaning. The phrase "heirs of the body" as

---

listed in his will in equal shares."

2

Debra Sue Otipoby was born September 16, 1954, to Geneva Otipoby Navarro, daughter of Esther Tooahimpah Brace, a daughter of the decedent, Frank Tooahimpah. She was adopted by her great aunt, Lois Tooahimpah Pahdopony on May 18, 1970, in the District Court of Caddo County, Oklahoma.

a technical and legal phrase in 1965 when decedent executed his Will and in 1966 when he died excluded adopted children and spouses. Moore v. McAlester, (OK 1967), 428 P.2d. 266.[3] There is nothing in decedent's Will nor the records hereinincluding the record in the Estate of Lois Tooahimpah Pahdopony, supra, which is made a part hereof by reference, showing or indicating that the decedent intended to include adopted children or grandchildren. Furthermore, there were no adopted children in decedent's family at the time of his death.

Assuming arguendo that the phrase "heirs of the body" is not a technical and legal phrase, its literal meaning excludes adopted children. Although the term or word "heir" may by virtue of the adoption statutes include children by adoption, the words "of the body" limit it to those born of the person referred to.

Accordingly, the claim of Debra Sue Pahdopony nee Debra Sue Otipoby, the adopted daughter of Lois Tooahimpah Pahdopony, deceased, must be denied and the remainder interest in that portion of decedent's allotment devised to Lois Tooahimpah Pahdopony for her life, passes under the residuary clause of decedent's Will to the other devisees listed in said Will in equal shares.

NOW THEREFORE, pursuant to the authority vested in the Secretary of the Interior by the Act of June 25, 1910 (25 USC 372, 373) and other applicable statutes, as delegated by 43 CFR Part 4, IT IS ORDERED adjudged and decreed in accordance with decedent's Last Will and Testament dated May 21, 1965, that the life estate of Lois Tooahimpah Pahdopony in the following described property has terminated:

3

See Hines v. First National Bank & Trust Co. (OK 1985), 708 P.2d, 1078; Posey v. Webb, (Miss. 1988), 528 So.2d. 833.

"All that part of the decedent's own allotment, Comanche 146, described as the

S1/2 NE1/4 NW1/4; NW1/4 NE1/4 NW1/4;
S1/2 NE1/4 NE1/4 NW1/4 and
NE1/4 NE1/4 NE1/4 NW1/4 of
Section 29-5N-10W, I.M.

containing 37.50 acres

and the remainder interest therein is now vested in the following named persons in the proportion indicated pursuant to the residuary clause of decedent's Will:

Hattie Tooahimpah Ware	Daughter	Comanche Unallottee	12/120
Estate of Esther Tooahimpah Brace (IP OK 46 P 90)	Daughter	Comanche Unallottee	12/120
Ernest Tooahimpah	Son	Comanche Unallottee	12/120
Eva Tooahimpah Watchetaker	Daughter	Comanche Unallottee	12/120
Eloise Tooahimpah Lincoln	Daughter	Comanche Unallottee	12/120
Geneva Woomavoyah Navarro	Granddaughter	Comanche Unallottee	12/120
Carl Tahmahkera	Grandson	Comanche Unallottee	12/120
Frank (Pinky) Tooahimpah (Tate)	Grandson	Comanche Unallottee	12/120

Children of James Tooahimpah, deceased Comanche 3422 (Probate H-29-71):

Dennis Frank Tooahimpah	Grandson	Comanche Unallottee	4/120
Julia Noressa Tooahimpah	Granddaughter	Comanche Unallottee	4/120
Vila Jean Tooahimpah	Granddaughter	Comanche Unallottee	4/120

Children of Jack T. Galindo, deceased Comanche Unallottee (Probate IB OK 16 P 85):

Francesca Gena Galindo	Gr. Granddaughter	Comanche Unallottee	3/120
Donna Marie Galindo	Gr. Granddaughter	Comanche Unallottee	3/120
Monica Lee Galindo	Gr. Granddaughter	Comanche Unallottee	3/120
Veronica Lynn Galindo	Gr. Granddaughter	Comanche Unallottee	3/120

IT IS FURTHER ORDERED that the Superintendent or other officer in charge make distribution of the above-described property as hereinabove indicated.

Done at Oklahoma City, Oklahoma on September 25, 1990.

SAM E. TAYLOR

VI

(Entered December 1, 1992)
IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

DEBRA SUE PAHDOPONY,
Petitioner,

vs. No. CIV-92-641-W

UNITED STATES DEPARTMENT OF THE INTERIOR,
Respondent.

ORDER

This matter comes before the Court upon Petitioner's Brief in Action to Set Aside Administrative Action of the United States Department of the Interior. Petitioner, Debra Sue Pahdopony, the adopted daughter and surviving heir of Lois Tooahimpah (Tate) Pahdopony, seeks to set aside the United States Department of the Interior's administrative action construing the last will and testament of Frank Nevaquaya Tooahimpah (Tate) to exclude Debra Sue Pahdopony as an heir of the body of Lois Pahdopony. The United States Department of the Interior ("the Department") has responded to the brief and upon consideration of the parties' submissions and the record, the Court makes its determination.

The testator, Frank Nevaquaya Tooahimpah (Tate), a Comanche Indian, died on July 15, 1966, at the age of 86. At the time of his death, the testator owned a substantial interest in restricted Indian land consisting of 155 acres of his original allotment and a fractional interest in six (6) other Comanche

allotments. Under the terms of his will dated May 21, 1965, the testator devised specific tracts of his land to each of his seven children and to four of his grandchildren. To his daughter Lois Pahdopony, the testator devised "40 acres of my own allotment described as NE/4 NW/4 Section 29-5N10W for her lifetime, with remainder to the heirs of her body."

Lois Pahdopony, died on April 16, 1988, leaving her husband and her adopted daughter, Debra Sue Pahdopony, as her heirs. Debra Sue Pahdopony is the natural daughter of Geneva Woomavoyah Navarro, who was the testator's granddaughter and Lois Pahdopony's grandniece. She was adopted by Lois Pahdopony on May 18, 1970, almost five years after the execution of the will and almost four years after the testator's death.

After Lois Pahdopony's death, the Department reopened the probate proceedings for the testator's estate to determine who would take the remainder interest in the portion of the testator's land that Lois Pahdopony had been devised as a life estate. After a hearing on the matter, the administrative law judge held that Debra Sue Pahdopony, an adopted daughter, was not an heir of the body of Lois Pahdopony.

On appeal, the Interior Board of Indian Appeals ("IBIA") affirmed the administrative law judge's determination that the phrase "heirs of the body," as used in the testator's will, does not include Debra Sue Pahdopony.[1] The IBIA, in its decision, acknowledged that construction of Indian wills is a question of federal law. However, the IBIA found that intestate heirs are determined with reference to state law. Thus, the IBIA

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[1] The IBIA did reverse the administrative law judge's determination as to the remainder interest under the residuary clause in the testator's will and found that Debra Sue Pahdopony was entitled to a portion thereof as the heir of deceased devisee Lois Pahdopony. This portion of the Board's decision is not a part of these proceedings.

concluded that "heirs of the body" were to be determined by Oklahoma law and under Oklahoma law, "heirs of the body" exclude adopted children.

Debra Sue Pahdopony contends that the IBIA erred in determining the phrase "heirs of the body" by reference to state law. She contends that the phrase should have been construed by reference to federal law. Although conceding that no federal law exists which construes the phrase, Debra Sue Pahdopony asserts that this Court should fashion a federal rule which provides that the phrase includes adopted children. Debra Sue Pahdopony contends that federal policy, federal case law and the modern trend of state case law support such construction.

In resolving the matter at hand, the Court concludes that it is not necessary to fashion a federal rule which mandates that the phrase "heirs of her body" or "heirs of the body" include adopted children. In this case, the Court must determine whether the testator in using the phrase in a will drafted in 1965 intended to limit the remainder interest in the 40 acres to the natural born children of Lois Pahdopony. And the Court concludes that he did. At the time of the will's execution and at the time of the testator's death, no federal court had addressed whether adopted children were included in the meaning of the phrase "heirs of the body" under federal law. However, the state courts which had construed the phrase had held that the phrase specifically excluded adopted children. See, First Nat. Bank of Kansas City v. Sullivan, 394 S.W.2d 273 (Mo. 1965); In re Kanoa's Trust Estate, 47 Haw. 610, 393 P.2d 753 (1964); Cutrer v. Cutrer, 334 S.W.2d 599 (Tex.Civ.App. 1960); Barton v. Campbell, 245 N.C. 395, 95 S.E.2d 914 (1957); See also, Restatement of Property, § 306 comment g (1940), 2 Am. Jur. 2d Adoption § 92 (1962). Because the prevailing position existing at the time of the will's execution and the testator's death construed the phrase to exclude adopted children, the Court finds that the testator's intent in using such phrase was to limit his devise to biological descendants. The Court finds no

evidence in the record to suggest that the testator did not understand the meaning of the phrase used. And without evidence to the contrary, the Court must assume that the attorney drafting the will for the testator explained the meaning of the phrase used in the will.

Although the exclusion of Debra Sue Pahdopony may not appear fair and equitable, the Court simply cannot rewrite the will to obtain such a result. Estate of Dorothy Sheldon, 7 IBIA 11, 85 I.D. 31 (1978). In construing the rights of an adopted child to take under a will, the Court concludes that it is not a question of the right of the adopted child to inherit, but simply a question of the testator's intention of who is to share in his estate.

Accordingly, the decision of the Interior Board of Indian Appeals on the issue herein is AFFIRMED.

ENTERED this 16th day of December, 1992.

LEE R. WEST
UNITED STATES DISTRICT JUDGE

X

(Entered January 20, 1994)
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DEBRA SUE PAHDOPONY,
Petitioner, Appellant,

vs.

No. 93-6021
(D.C. No. CIV-92-641-W)
(W.D. Okla.)

UNITED STATES DEPARTMENT OF THE INTERIOR,

Respondent, Appellee.

ORDER AND JUDGMENT[1]

Before SETH, BARRETT, and McKAY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not

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1 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. ____ F.R.D.____.

materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Appellant, Debra Sue Pahdopony, seeks review under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, of the Secretary of the Interior's decision that the phrase "heirs of the body" as used in the will of Frank (Tate) Nevaquaya Tooahim pah, a Comanche Indian, meant that no adopted children were to be included in those taking after a life estate. The district court affirmed the Secretary's decision by order entered December 16, 1992, and Ms. Pahdopony appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291.

Mr. Tooahimpah (the Testator) executed his will in May 1965 and died in July 1966. At the time of his death, he owned a substantial interest in restricted Indian lands located in Oklahoma, all of which were in an area administered by the Anadarko Agency of the Bureau of Indian Affairs. Adult Indians make testamentary dispositions of their interest in restricted lands in accordance with regulations promulgated by the Department of Interior (DOI), subject to the approval of the Secretary of the Interior. 25 U.S.C. § 373; see also 43 C.F.R. §§ 4.200-.340. Indian wills are probated in the DOI and not in state courts or under state procedure. The construction of Indian wills is governed by federal law. Estate of Garcia, 14 IBIA 106, 1986 WL 80101 at *1 (1986).

The Testator's will was admitted to probate before the DOI and was approved on February 20, 1967. The will was drafted by a DOI employee using a standard DOI form. The Testator devised his interest in described tracts of land to each of the Testator's seven children and to his four grandchildren. The devises to the Testator's children, including the one at issue here, were to the devisee "for her [or his] lifetime, with remainder to the heirs of her [or his] body." Appellant's App. at 53. The devises to the Testator's grandchildren were in fee simple.

Appellant was born on September 15, 1954, to Geneva Woomavoyah Navarro, one of the Testator's grandchildren and a devisee under his will. From the age of two Appellant lived with and was raised by Lois Pahdopony, one of the Testator's daughters. In 1970, after Testator's death, Lois formally adopted Appellant under the laws of Oklahoma.

In 1983, Lois and her sisters Esther and Hattie sought approval from the Anadarko Area Director of consent agreements each had entered into with the people she believed to be the heirs of her body. Appellant executed a consent agreement with Lois in "[her] capacity as a living heir of the body of [her] mother and consequently as an owner of a remainder interest in the [described] property." Appellant's App. at 49. The purpose of the agreements was to allow the three life tenants to receive royalties from oil and gas production on the lands in which they had an interest. The Area Director submitted the matter to the administrative law judge (ALJ) with a memo indicating that he thought the consent agreements should be approved if the ALJ could determine the identity of the remaindermen of the three life estates.

The ALJ construed the submission as an application to reopen the Testator's estate. He denied the petition to reopen on the ground that the identity of the remaindermen of each life estate could not be determined until the life tenant died. In so ruling, the ALJ said:

> The term "heirs of her body" or "heirs of the body" is a term of art, ordinarily meaning a named person's lineal descendants who can take under the statutes excluding a spouse. An "heir" is one who inherits by law, Moffett v. Co[n]ley, 163 P. 118 (Okla. 191[6]); In re Trust Estate of Kanoa, 393 P.2d 753 (Hawaii 1964).

Appellant's App. at 42. Lois and her sisters appealed the ALJ's ruling to the Interior Board of Indian Affairs (IBIA), which

affirmed the ALJ's ruling that the heirs of the bodies of the respective life tenants could not be determined until the life tenants died.

Lois Pahdopony died on April 26, 1988, survived by her husband, who subsequently died, and by Appellant. In March 1990, the ALJ reopened the Testator's estate to determine the heirs of the body of Lois Pahdopony. Appellant claimed that she was an heir of Lois' body. The ALJ ruled that "heirs of the body" was a legal and technical phrase that must be given its technical meaning "absent a clear showing the testator intended a different meaning." Appellant's App. at 19. The ALJ concluded that when the Testator executed his will, the technical meaning of the phrase "heirs of the body" under Oklahoma law excluded spouses and adopted children. The ALJ further concluded that the literal meaning of the term excludes adopted children: "Although the term or word 'heir' may by virtue of the adoption statutes include children by adoption, the words 'of the body' limit it to those born of the person referred to." Id. Therefore, the ALJ ruled that Appellant could not inherit Lois' interest in the property devised by the Testator's will. Appellant appealed the ALJ's decision to the IBIA, which affirmed the ALJ's ruling that the term "heirs of the body" did not include adopted children.

Appellant sought review of the IBIA's decision--which constituted the final decision of the Secretary--in the district court. The district court affirmed the Secretary's decision. The court noted that at the time the Testator executed the will and at the time he died no federal court had addressed whether adopted children were included within the term "heirs of the body". A number of state courts had considered the matter, however, and the district court determined that the prevailing position of the state courts in the mid-1960s was to construe the phrase to exclude adopted children. The court further concluded that in using the phrase "heirs of the body," the Testator here intended "to limit his devise to biological descendants" and Testator's

intent is significant in our analysis.

We review the Secretary's decision to determine if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or is "unsupported by substantial evidence." 5 U.S.C. § 706(2) (A), (E); Akers v. Hodel, 871 F.2d 924, 926 n.1 (10th Cir. 1989).

The parties agree that the interpretations of Indian wills is governed by federal law. Federal courts have set forth some basic principles governing the interpretation of wills. First and foremost is the principle that the intent of the testator governs the disposition of the testator's estate. Estate of Bruning v. Commissioner, 888 F.2d 657, 659 (10th Cir. 1989) (per curiam). That intent is to be determined from the entire will, as of the time the will was executed. Id.

If the will is examined under Oklahoma law alone, without considering the intent of the decedent, the result is obvious. At the time the will was executed, the technical meaning in Oklahoma of "heirs of the body" excluded adopted children. Moore v. McAlester, 428 P.2d 266 (Okla. 1967). However, since this will is subject to DOI approval, federal law governs the analysis, if a legal analysis is necessary. But the Testator's intent is crucial in determining whether "heirs of the body" excludes Appellant.

To arrive at the intent of the Testator as to the meaning of the term "heirs of the body," it is necessary to consider the testimony of a witness to the will at the hearing on the will held in December of 1966. This witness, George Asepermy, a cousin of the Testator, testified in part:

> Q. Now I show you this will that I read a few moments ago and ask you if your signature appears on that will?
>
> A. Yes.

Q. That will was made by Mr. Haight in the Field Solicitor's Office, is that correct?
A. Yes.
Q. Was it made in his office?
A. Right in his office.
Q. Now were you present when Frank discussed with Mr. Haight what he wanted in the will?
A. Yes, I was the interpreter.
Q. He didn't speak in English?
A. Well, he could but . . . .
Q. He preferred to deal through an interpreter on something like this?
A. Yes.
Q. And he told you in Comanche what he wanted?
A. Yes.
Q. And you translated that into English and told Mr. Haight?
A. Yes.
Q. Now after that was done this will was typed up, is that correct?
A. Yes.
Q. Now did you read it back to him?
A. Yes.
Q. Did the instrument as it now appears, accurately reflect what he wanted done at that time?
A. Yes.
Q. And you were satisfied that he understood it?
A. Yes, he understood English.
Q. He understood it but just as a double check?
A. Yes.

Q. And at the time that he made this will was his mind clear and alert?
A. Yes.
Q. He knew what he was doing?
A. Yes.
Q. He knew the members of his family?
A. Yes.
Q. And he knew the property that he owned?
A. Yes.
Q. And he knew what he wanted each of them to have?
A. Yes.
Q. Now he did indicate at that time that this was to be his last will and testament?
A. Yes.

This quotation is significant in that it describes what took place preparatory to the actual drafting of the will. This indicates no consultation between the Testator and Mr. Haight at the Agency office, and no explanations. Thus:

Q. And he told you in Comanche what he wanted?
A. Yes.
Q. And you translated that into English and told Mr. Haight?
A. Yes.
Q. Now after that was done this will was typed up, is that correct?
A. Yes.
Q. Now did you read it back to him?

The person who posed the questions in a previous question (quoted above) used the word "discussion", but the witness

described the events and the sequence. The Testator understood and read English. The will was read back to the Testator, in English, and he understood it.

In view of this testimony, and with no testimony by Mr. Haight at the hearing, it is preferable to assume that the Testator as a practical matter understood "heirs of the body" of Lois to mean her natural "of the body" children--her biological "of the body" offspring. This was the obvious practical meaning of the term. This result does not depend on a double assumption first that Mr. Haight explained the meaning of a legal term, when the testimony shows no explanation, although it purports to describe the events preliminary to the drafting of the will; and the second assumption that he explained the term in accordance with the Oklahoma state court decisions which he may or may not have been familiar with.

This practical meaning, the "bodily" meaning, we can safely conclude would survive a translation. But the testimony shows that no translation was really needed. This analysis and conclusion, again, does not require the assumption that an explanation was made, which appears to be contrary to the record, and that it was of holdings in Oklahoma state court decisions. Instead, the term should not be considered a complex legal term under English common law, federal law, or Oklahoma decisions, but as a practical biological term--children born of Lois. "Heirs" alone may need some legal analysis, but when "of the body" is added it is brought down to earth. If it makes any difference, all that need be said is that the practical meaning is not contrary to federal law and the common law, nor the Oklahoma decisions. See Hurt v. Noble, 817 P.2d 744 (Okla. App. 1991); Hines v. First National Bank & Trust Co., 705 P.2d 1078 (Okla. 1985); Moore v. McAlester, 428 P.2d 266 (Okla. 1967).

We thus generally agree with the trial court's conclusion that by using the term "heirs of the body" the Testator intended "to limit his devise to biological descendants."

XVIII

We have considered what the parties refer to as the Anadarko Memorandum issued by the Agency in January 1984. This describes the prevailing view why the creation of life estates in Indian wills is a preferred device in devising real property interests to exclude in-laws. We conclude that it is not applicable nor persuasive here although it is apparent that the description of remaindermen is an integral part of the creation of a life estate.

AFFIRMED.

Entered for the Court

OLIVER SETH
CIRCUIT JUDGE